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No. 83-963

In The

Supreme Court of the United States

October Term, 1983

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON,
Petitioner,

v.

LOUIS H. PASTORE, JR., in his capacity as
Liquor Control Administrator of the
State of Rhode Island and
ATTIC LOUNGE, INC.,
Respondents.

**ON WRIT OF CERTIORARI TO
THE RHODE ISLAND SUPREME COURT**

BRIEF OF THE PETITIONER

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I.

QUESTION PRESENTED

Under what circumstances should the exclusionary rule, prohibiting as violative of the Fourth Amendment to the United States Constitution the use in a criminal trial of evidence obtained pursuant to an unlawful search and seizure (the Fourth Amendment made applicable to the states through the Fourteenth Amendment), properly be applied to exclude the admission of such evidence in a civil administrative proceeding.

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PETITION FOR WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court in the instant case is reported at 463 A.2d 161 and appears at pages A-1 to A-10 in the Petition for Writ of Certiorari. The opinion of the Providence County Superior Court appears in the Appendix accompanying this brief at page 11.

JURISDICTION

The decision of the Rhode Island Supreme Court was rendered on July 18, 1983. The Petition for Writ of Certiorari was filed on December 13, 1983 and the Writ was issued on July 5, 1984. The Court's jurisdiction to review the decision of the Rhode Island Supreme Court by Writ of Certiorari is conferred by 28 USC Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall be not violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2. The Fourteenth Amendment to the Constitution of the United States.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also relevant are Rhode Island General Laws Section 9-19-25 which appears at page A-12 in the Petition for Writ of Certiorari, Rhode Island General Laws Section 3-5-23 which appears at page A-11 in the Petition for Writ of Certiorari, and Rhode Island General Laws Section 3-12-3 which appears in the Appendix to this brief at page 54.

STATEMENT OF THE CASE

By granting Certiorari in this case, this Court has agreed to review a decision of the Rhode Island Supreme Court, which decision in turn was a review of a lower Rhode Island court decision pursuant to a Certiorari Petition requested by the Board of License Commissioners of the Town of Tiverton, Rhode Island. In Tiverton, as in other Rhode Island cities and towns, the Town Council serves as a Board of License Commissioners for the purpose of granting, renewing, suspending or terminating liquor licenses within the town. In March of 1977, Respondent, the Attic Lounge, Inc. was a licensed liquor-serving establishment within the Town of Tiverton. On March 11, 1977 several Tiverton police officers entered the Lounge pursuant to a search warrant and found stolen property (clothing) on the premises. As a result, two actions were initiated. Criminal proceedings were initiated against individuals associated with the Attic Lounge by the State of Rhode Island for possession of stolen property. At the same time, the Tiverton Town Council, acting as a Board of License Commissioners, revoked the bar's liquor license pursuant to Rhode Island General Laws Section 3-5-23 after a hearing at which evidence of the finding of the stolen property was pre-

sented. Rhode Island General Laws Section 3-5-23 provides for the revocation of a liquor license where a licenseholder permits any of the laws of the State of Rhode Island to be violated on the licensed premises. (RIGL Section 3-5-23 is recited in full at A-11 in the Appendix accompanying the Petition for Writ of Certiorari). The criminal proceedings were ultimately dismissed after a judge of the Rhode Island Superior Court (Rhode Island's criminal trial court) held that the search warrant obtained by the Tiverton police to search the Lounge was defective.

The principals of the Attic Lounge, Inc. appealed the revocation of the Lounge's liquor license to Respondent Louis H. Pastore, then Liquor Control Administrator for the State of Rhode Island. The Administrator held a de novo hearing on July 6, 1978 and received undisputed evidence that a conviction for possession of stolen property had never been obtained against any individual associated with the Lounge. The Administrator, believing that a conviction was necessary in order for a town to assert the provisions of RIGL 3-5-23, reversed the revocation of the Lounge's license and ordered that the license be reinstated.

Thereafter Petitioner filed an appeal to the Providence County Superior Court (which had statutory authority to review rulings of the Liquor Control Administrator) which affirmed the Administrator's ruling. The Superior Court held that the Administrator had erred in holding that a conviction was necessary to revoke a liquor license pursuant to RIGL Section 3-5-23. However, the Court held that because evidence of the stolen property at the Attic Lounge premises had been obtained pursuant

to a void search warrant, the exclusionary rule barred the presentation of such evidence before the Board of License Commissioners which could not therefore rely upon it in revoking the Attic Lounge's liquor license.

Petitioner then filed a Petition for Writ of Certiorari with the Rhode Island Supreme Court seeking review of the Superior Court's decision. That petition was granted by the Rhode Island Supreme Court which reviewed the Superior Court's decision and affirmed the holding that the exclusionary rule ought properly to be extended to municipal liquor license revocation proceedings.

The Rhode Island Supreme Court in its decision discussed the genesis of the exclusionary rule, (which bars the admission in a criminal trial of evidence obtained by an illegal search and seizure) in *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and its later extension to state criminal trials in *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The acceptance of this rule in Rhode Island is symbolized by the enactment by the Rhode Island General Assembly of Rhode Island General Laws Section 9-19-25 (A-12 in Appendix in Petition for Writ of Certiorari) which codifies as an evidentiary rule in criminal trials in Rhode Island the provisions of *Weeks* and *Mapp.*

The Rhode Island court admitted that it could find no decision by this Court determinative of the question of whether the exclusionary rule should be applied to administrative hearings. Its decision to extend the rule to the liquor license hearing in issue was heavily dependent on this Court's decision in *One 1958 Plymouth Sedan v. The Commonwealth of Pennsylvania,* 380 U.S. 693, 85 S.

Ct. 1246, 14 L.Ed.2d 170 (1965), which extended the exclusionary rule to a state forfeiture proceeding. The Rhode Island court also touched on this Court's ruling in *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), from which it extracted the holding that in extending the exclusionary rule past the initial criminal trial, the potential benefits of applying the rule were to be balanced against the potential for damage from such application. The Rhode Island court however was decidedly unbalanced in applying the balancing test, for it limited its consideration only to the benefits of extension, with very little discussion of the disadvantages. In effect, it held that the importance of undiluted application of the rule, in order to assure its effectiveness, rendered irrelevant discussion of any arguments mitigating against extension.

The Rhode Island Supreme Court also discussed this Court's ruling in *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), in which this Court declined to extend the exclusionary rule to civil proceedings that were inter-sovereign in nature. The Rhode Island Court however distinguished *Janis* by typifying the factual situation before it as intra-sovereign, and held that in any event, "the potential deterrent effect of the exclusionary rule on the agents of an intra-sovereign agency is strong enough to outweigh the costs to society of refusing to admit evidence obtained in violation of constitutional imperatives. [citations omitted]"[1] (Rhode

1. The Rhode Island Court noted Petitioner's argument that it had declined to extend the rule to probation revocation hear-

(Continued on next page)

Island Supreme Court decision at A-8, Petition for Writ of Certiorari.) It is interesting that the Rhode Island Supreme Court cited as support for its decision the decision of the Ninth Circuit Court of Appeals in *Lopez-Mendoza v. Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983), a decision which was overruled by this Court in its 1983-1984 term. (See *Immigration and Naturalization Service v. Lopez-Mendoza, infra.)*

SUMMARY OF ARGUMENT

This Court has on a number of occasions reviewed the issue of appropriate application of the exclusionary rule. First enunciated in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) and extended to state criminal trials in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1081 (1961), the sweep of the rule has been limited by this Court in more recent years. In *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), the case which first presented this Court with the question of civil application of the rule, it was held appropriate to balance the various societal and constitutional interests affected in determining proper extension of the rule to civil proceedings; it was further held

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ings (*State v. Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978), or to bail revocation hearings (*Bridges v. Superior Court*, 121 R.I. 101, 396 A.2d 97 (1978).) The court's response however was to find a greater public interest in supervision over bail and probation offenders than in the proper conduct of enterprises licensed to sell and distribute alcoholic beverages.

that such extension was not appropriate in "inter-sovereign" situations.

In *Janis,* there was also some doubt expressed concerning whether and how well application of the exclusionary rule resulted in that which was its chief purpose —deterrence of police misconduct by forbidding admissability of evidence unlawfully obtained. In *Janis* and in a case recently decided by this Court—*Immigration and Naturalization Service v. Lopez-Mendoza,* 52 USLW 5190 (1984), extension of the rule was rejected where the circumstances presented by each case convinced this Court that any incremental deterrence which might result from such extension was likely to be low.

This case presents to this Court the issue of whether the exclusionary rule was properly applied to a municipal liquor license revocation hearing. Petitioner believes that the Court can decide this case in one of three ways:

1. by applying the *Janis* balancing test;

2. by refining the balancing test by establishing additional criteria (similar to the inter-sovereign rule) to aid in a determination of proper civil application of the rule;

3. by holding that civil extension is not appropriate where criminal exclusion of the unlawfully obtained evidence has already occurred.

The Court must be aware of the effect that its decision will have on law enforcement, and on the likelihood for uniformity in lower court decisions construing it. The existing balancing test, despite its attractiveness, has resulted in a disparity of results in the decisions of

lower courts applying it to the issue of civil extension of the rule. Further, the lack of predictability as to when civil application of the rule will be judicially upheld must of necessity cause law enforcement officers to be indifferent to the civil repercussions of constitutionally invalid search and seizures.

Combining the holdings of *Janice* and *Lopez-Mendoza,* Petitioner offers the following as specific additional considerations in applying the balancing test;

1. Has the evidence sought to be excluded in the civil forum already been excluded in a criminal forum?

2. Do the facts presented to the court mitigate against additional deterrence following civil exclusion? Such would be the case if:

a) the facts presented an inter-sovereign situation;

b) unique characteristics having to do with the status of the offender allow a law enforcement officer greater latitude in making an arrest or obtaining evidence, and/or allow an administrative judge greater latitude in what evidence he must have for a finding adverse to the offender. Any of the above would dilute the strong medicine of exclusion;

c) other circumstances unique to the civil hearing concerned render the deterrence value of extension of the rule low, such as the officer's unlikely ability to anticipate that any civil hearing will result from the evidence he seeks to obtain of criminal behavior.

The Court must then consider the social costs of civil exclusion. Petitioner believes that the price is too high where society must absorb not only the cost of foregoing criminal prosecution, but the duty as well of revoking a license or other privilege extended to a holder, retention of which is contingent on good behavior.

The Court finally has the option of rejecting further civil exclusion of tainted evidence where criminal exclusion has already occurred. Such a decision would no doubt be in recognition of the judicially expressed skepticism of the exclusionary rule's deterrence of police misconduct, and could reflect as well the belief that police officers — who function primarily as agents for the detection of violations of the criminal code — are not greatly influenced by the civil consequences of their misbehavior.

Petitioner believes that application of any of the three preceding tests by this Court would justify reversal of the decision being reviewed. This would of course be true if this Court opted to foreclose civil exclusion of evidence where criminal exclusion had already occurred.

Application of the *Janis* balancing test (which *Lopez-Mendoza* has rendered applicable to intra-sovereign situations) should also result in reversal. The liquor license hearing room was outside the zone of primary interest for the Tiverton police officers searching the Attic Lounge. They had secured a warrant to search for stolen goods and were acting as agents of the State of Rhode Island in its enforcement of its criminal code when they did so. Unlike the officers in *Lopez-Mendoza,* who searched for evidence and made arrests especially for presentation to a civil deportation hearing, Tiverton's

police officers were functioning as enforcement officers of the State's criminal code. There is little further deterrence to be gained from additional exclusion of the evidence they obtained.

As in *Lopez-Mendoza,* there are circumstances unique to liquor license control which argue against civil application of the exclusionary rule to revocation hearings in Rhode Island, and no doubt in numerous other states as well. Police officers, by state statute, have free access to licensed establishments to maintain order and to ascertain that no laws are being violated. With such free access, officers who suffer the exclusion of evidence obtained under color of a warrant later held invalid, will simply eschew entering licensed establishments in the manner associated with criminal searches, and will instead enter pursuant to the access given them by the state licensing laws.

Whichever balancing test is applied, Petitioner believes that social concerns, given short shrift by the lower court, dictate reversal. Licensed liquor-serving establishments, by virtue of their nature, have traditionally and appropriately been subject to tight local regulation. Such regulation includes amenability to police inspection at all times. This policy of free access by authorities to licensed liquor-serving establishments represents a societal concern which deserves to outweigh any additional deterrence which might come from subjecting liquor license revocation hearings to the evidentiary limitations of the exclusionary rule.

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ARGUMENT

I. The Exclusionary Rule ought not to be extended to a Liquor License Revocation Hearing to exclude evidence, relevant to the license proceeding, which has already been suppressed in a criminal forum.

A. Recent decisions of this Court have reversed an earlier trend toward expansive application of the exclusionary rule.

1. Earlier decisions of this Court expanded use of the rule.

The exclusionary rule bars the use in an adversarial proceeding of evidence obtained by a law enforcement officer by illegal means. The exclusionary rule has been controversial since its enunciation in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). Initially applicable only to federal criminal trials, its extension to state criminal proceedings in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1081 (1961) multiplied its application to state courts in fifty jurisdictions and, in the opinion of its critics, compelled law enforcement officers to be students of search and seizure law. The chief purpose of the rule, as stated by Mr. Justice Stewart in *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1169 (1960) is apparently now established as preventative: "Its purpose is to deter — to compel respect for the constitutional guarantee in the only effectively available way — by removing the incentive to disregard it." 364 U.S. 206 at 217, 80 S.Ct. 1437 at 1444.[2]

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2. Justice Brennan, dissenting in *United States v. Calandra, supra* disagreed, holding the chief purpose of the rule to be "enabling the judiciary to avoid the taint of partnership in official lawlessness," and "assuring the people . . . that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." 414 U.S. at 357, 94 S.Ct. at 624.

Appropriate extension of the rule has been a frequent issue for this Court to resolve. In the first years following *Mapp*, resolution of this issue was usually in favor of extension. *Elkins* extended the rule to evidence obtained illegally by state authorities which was offered for use in a federal criminal proceeding. *Mapp* of course extended the rule to all state criminal proceedings. In 1965, in a ruling relevant to the question now before the Court, this Court held the rule dictated exclusion, in a civil forfeiture proceeding, of unlawfully obtained evidence. See *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 694, 85 S.Ct. 1246, 14 L.Ed.2d 170. Such non-criminal extension is justified by the Court to a proceeding civil in form, but deemed criminal in nature, in that the purpose of such a proceeding was forfeiture of a man's property by reason of prior criminal offenses. 380 U.S. at 697, 85 S.Ct. at 1249.[3]

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3. The court's ruling was dependent in large part on its earlier ruling in *Boyd vs. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, (1886), a ruling which pre-dated the enunciation of the exclusionary rule in *Weeks*. The *Boyd* court, examining a proceeding by the United States to forfeit goods which had allegedly been imported without payment of a customs duty, held that the government could not seize evidence in violation of the Fourth Amendment for use in a forfeiture proceeding. Held the *Boyd* Court:

> We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal . . . If the government prosecutor elects to waive an indictment and to file a civil information against the claimants—that is civil in form—can he by this device take from the proceedings its criminal aspect and deprive the claimants of their immunities as citizens . . .? This cannot be. The information, though technically a civil proceeding is in substance and effect a criminal one. 116 U.S. at 633-634, 6 S.Ct. at 534.

2. More recent decisions have balanced competing interests and limited application of the rule.

More recent decisions of this Court however, have seen fit to limit criminal application of the rule where the benefits of extension were found to be outweighed by the risks. Thus the exclusionary rule's sweep has been held not to include grand jury hearings *(United States v. Calandra, supra),* or federal habeas corpus proceedings *(Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)), or to bar the use of unlawfully obtained evidence to impeach the credibility of a criminal Defendant *(Walder v. United States,* 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed.2d 503 (1954)). In each of these decisions, defining the use of the rule in the criminal arena, the Court has balanced the interest of deterrence of unconstitutional police behavior against the potential imposition on criminal procedures and has determined that societal interests were best served by not extending the exclusionary rule to the proceeding in issue.

In 1976, in *United States v. Janis,* 428 US 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046, this Court stepped away from the inflexible "quasi-criminal" test of *Plymouth Sedan,* and applied the balancing test to a civil tax assessment proceeding. Although the taxing authority was the Internal Revenue Service, the evidence sought to be introduced at its forum had been illegally obtained by Los Angeles police officers. This Court, in a decision which gave rise to the "inter-sovereign rule", held admissible evidence at a civil proceeding of one sovereign which had been unlawfully obtained by a criminal law enforcement agent of another sovereign.

3. Janis and Lopez-Mendoza reflect concern over when and if deterrence really occurs.

The *Janis* "inter-sovereign" exception resulted in no small part from the lack, as stated in Mr. Justice Blackmun's decision, of empirical proof that the exclusionary rule actually discourages unlawful searches.[4] With such uncertainty about the effectiveness of excluding tainted evidence from criminal proceedings, the *Janis* court was prepared to decide that there was likely to be no deterrence to constabulary misconduct justifying the exclusion of such evidence in "inter-sovereign" civil situations. Mr. Justice Blackmun commented in his opinion in *Janis:*

> If the exclusionary rule is the "strong medicine" that its proponents claim it to be, then its use in the situations in which it is now applied (resulting, for example, in this case in frustration of the Los Angeles police officers' good-faith duties as enforcers of the criminal laws) must be assumed to be a substantial and efficient deterrent. Assuming this efficacy, the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation. If, on the other hand, the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted. Under either assumption, therefore, the extension of the rule is unjustified. 428 U.S. at 454-455, 86 S.Ct. at 3032.

The Court distinguished its ruling in *Janis* from its ruling sixteen years previous in *Elkins:*

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4. In fact, Justice Blackmun cited a number of criteria which would render difficult, if not impossible, the achievement of any conclusive statement, based on empirical data, as to the actual deterrent effect of the rule. 428 U.S. at 453, 96 S.Ct. at 3021.

In *Elkins* the Court indicated that the assumed interest of criminal law enforcement officers in the criminal proceedings of another sovereign counterbalanced this attenuation sufficiently to justify an exclusionary rule. Here, however, the attenuation is further augmented by the fact that the proceeding is one to enforce only the civil law of the other sovereign.

This attenuation, coupled with the existing deterrence effected by the denial of use of the evidence by either sovereign in the criminal trial with which the searching officer is concerned, creates a situation in which the imposition of the exclusionary rule sought in this case is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest. The extension of the exclusionary rule, in our view, would be an unjustifiably drastic action by the courts in the pursuit of what is an undesired and undesirable supervisory role over police officers. 428 US at 458, 96 S.Ct. at 3034.

The most recent holding by this Court relevant to the issue at bar is the decision authored by Justice O'Connor in *Immigration and Naturalization Service v. Lopez-Mendoza et als,* 52 USLW 5190 (1984). *Lopez-Mendoza* called upon this Court to determine whether evidence of an unlawful arrest of one Mexican alien and evidence of an admission resulting from an unlawful arrest of a second Mexican alien should have been suppressed at deportation proceedings held under the auspices of the Immigration and Naturalization Service before an Immigration Judge. This Court answered both questions in the negative, depending heavily upon the balancing test criteria it had enunciated in *Janis.*

Justice O'Connor pointed out that a deportation proceeding is a purely civil action to determine the eligibility

of an alien to remain in the United States; rather than punishing an unlawful entry by fine or imprisonment, the deportation proceeding looks prospectively to an alien's right to remain in this country. Evidence of past criminal conduct of the alien (such as illegal entry or other criminal conduct) is relevant only insofar as such conduct may shed light on the alien's right to remain. The Court admitted that the deterrent value of applying the exclusionary rule in deportation proceedings might be higher than it was in the proceeding under review in *Janis;* the Court also believed it to be quite clear that the social costs would be much greater as well. While also admitting that the *Lopez-Mendoza* proceeding represented an "intra-sovereign" violation, (in which the allegedly offending immigration officer was employed by the sovereign which officiated at the civil forum in which the tainted evidence was sought to be presented) the Court, applying the *Janis* balancing test, reached a determination of non-application of the exclusionary rule for the following reasons:

1. Regardless of how the arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation.

2. Very few deportees challenge the circumstances of their arrest. When an occasional challenge is brought, the consequences from the point of view of the immigration officer's overall arrest and deportation record will be trivial. In these circumstances the arresting officer is less likely to shape his conduct in anticipation of the exclusion of evidence in a formal deportation hearing.

3. The INS possesses its own comprehensive scheme for deterring Fourth Amendment violations by its officers.

4. Any deterrent value of extending the exclusionary rule to deportation proceedings is undermined by the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights.

The Court then enumerated a number of societal interests mitigating against extension of the exclusionary rule to deportation hearings. Most important was the Court's concern that application of the exclusionary rule to deportation hearings would compel the immigration courts to release from custody persons who would then immediately resume their commission of a crime through their continuing unlawful presence within the United States.

B. In ruling on case at bar, Court can apply Janis, refine Janis, or decline to extend rule where evidence previously excluded.

A consistent concern in *Janis, Calandra* and *Lopez-Mendoza* is this court's reluctance to extend the exclusionary rule's application where there is doubt about whether any increased deterrence to police misconduct will follow. This Court in *Janis* has already declined to extend the rule beyond the law enforcement officer's zone of interest and has determined that inter-sovereign administrative hearings are beyond that zone. In *Lopez-Mendoza,* this Court declined extension even in the closest of intra-sovereign situations where circumstances unique to immigration procedures mitigated against the likelihood of deterrence.

In deciding the case before it, this court can proceed in one of three ways:

i. the Court can apply the balancing test of *Calandra* and *Janis* to the facts presented by this appeal;

ii. the Court can refine the balancing test beyond *Janis* by identifying other general considerations, whether in the deterrence category or in the societal interest category, which would dictate extension or non-extension of the rule to civil proceedings. Such a refined balancing test would then be applied to the facts of this case;

iii. the Court can hold that the exclusionary rule shall not be applied to "intra-sovereign" civil proceedings to exclude evidence which has already been excluded in a criminal proceeding.

1. Legacy of Janis and balancing test.

In deciding which option to choose, this Court should consider the impact of each option upon law enforcement and should be concerned as well with fashioning a precedent which will be evenly applied by the lower courts. The *Calandra-Janis* "balancing test" is, at least theoretically the fairest method, but creates the following problems for law enforcement and as precedent:

a. Since 1974, there has been a great disparity of results between liberal and conservative jurisdictions in their application of the balancing test to the issue of civil application of the exclusionary rule;

b. The resulting lack of predictability as to when and where the rule will be applied civilly assures a de facto

attenuation of any deterrent effect which the rule may have. If law enforcement officers cannot predict how sweeping will be the exclusion of evidence they might obtain unlawfully past the criminal proceeding proper, it seems likely that they will act, and may be entitled to act, in total disregard of the possibility that such evidence may be excluded in more than just the initial criminal forum. As this Court stated in *United States v. Peltier,* 422 U.S. 531 at 539, 95 S.Ct. 2313 at 2318, 45 L.Ed.2d 374 (1975) (quoting from *Michigan v. Tucker,* 417 U.S. at 447, 94 S.Ct. 2357, 2365, 41 L.Ed.2d 182, (1974):

> The deterrent effect of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the Defendant of some right.

The *Peltier* court continued:

> If the purpose of the exclusionary rule is to deter unlawful police misconduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. 422 U.S. at 542, 955 S.Ct. at 2320.

This argument assumes that there is no deterrence where there is no foreseeability. Just as a police officer will not be deterred from conduct which he does not know is wrong, so he will similarly not be deterred where he cannot reasonably foresee all of the consequences of any misconduct.

Illustrative of the divergent results that can result from the balancing test are the Rhode Island Supreme Court decision under review and the decision of the California Supreme Court in *Emslie v. State Bar of Califor-*

nia, 11 Cal.3d 210, 113 Cal.Rptr. 175, 520 P.2d 991 (1974).[5] The Rhode Island decision does not really balance competing interests, but after citing *Calandra,* relies on decisions in New York and Pennsylvania *(Finn's Liquor Shop v. State Liquor Authority,* 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584, cert, denied, 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (1969) and *Pennsylvania Liquor Control Board v. Leonardziak,* 210 Pa.Super. 511, 233 A2d 606 (1967)—both of which pre-date *Calandra)* which hold that the sweep of the exclusionary rule must not be limited only to criminal proceedings or its deterrent influence will be threatened.

In *Emslie* on the other hand, the California Supreme Court declined extension of the exclusionary rule to disbarment proceedings of an attorney accused of criminal conduct. The *Emslie* Court did not rely on *Calandra,* but on two of its own earlier decisions which anticipated the balancing test: *People v. Moore,* 69 Cal.2d 674, 72 Cal. Rptr. 800, 446 P.2d 800 (1968) and *In Re Martinez,* 1 Cal. 3d 641, 83 Cal.Rptr. 382, 463 P.2d 734 (1970). The Court found no deterrent effect in extending the exclusionary rule to attorney disciplinary proceedings, and while declining to say that such disciplinary proceedings could never be subject to the confines of the rule, held that the

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5. See also Andreoli, "Admissibility of Illegally Seized Evidence in Subsequent Civil Proceedings: Focusing on Motive to Determine Deterrence" 51 Fordham Law Review 1019 (1982-83) for a summary of the diverging results achieved by lower courts applying the *Janis* balancing test, and the *Plymouth Sedan* quasi-criminal test as well, to the issue of civil exclusion of evidence.

protection of the courts and integrity of the legal profession, dictated non-extension in the case before it.[6]

The closest this Court has come to establishing guidelines for civil application of the exclusionary rule was in *Janis*. Lower courts however have felt free to distinguish *Janis* from many of the most frequent civil exclusionary rule issues brought before them due to the confinement of the *Janis* ruling to "inter-sovereign" situations. Recently in

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6. The State of California presents a text book example of mixed civil application of the exclusionary rule. In *People vs. One 1960 Cadillac Coupe*, 62 Cal.2d 92, 41 Cal.Rptr. 290, 396 P.2d 706 (1964), the California Supreme Court sanctioned the use of the exclusionary rule in a civil proceeding for forfeiture of a car used in unlawful transportation of marijuana, holding: "whatever the label which may be attached to the proceeding, it is apparent that there is a close identity to the aims and objectives of criminal law enforcement. On policy, the same exclusionary rules should apply to improper state conduct, whether the proceeding contemplates the deprivation of one's liberty or property." 62 Cal.2d at 96-97, 41 Cal.Rptr. at 293, 396 P.2d at 709. In *People v. Moore, supra*, a similarly close identity was found between a civil narcotic addict committment proceeding and the aims and objectives of criminal law enforcement and the exclusionary rule was held applicable to such a civil proceeding as well. In *In Re Martinez, supra*, concerning a parole revocation proceeding, the California Supreme Court also found identity between the revocation proceedings and the aims and objectives of criminal law enforcement, but found practically no deterrent effect to be anticipated by application of the exclusionary rule to that proceeding. A lower California district court of appeals decision in *Governing Board, Mountainview School District v. Metcalf*, 36 Cal.App.3d 546, 111 Cal.Rptr. 724 (D.Ct.App. 1974) held the exclusionary rule inapplicable to a teacher's disciplinary hearing. The exclusionary rule was recently held applicable to a Department of Motor Vehicles hearing involving misuse of Department vehicles in *Taylor Bus Service v. Doris Alexis as Director of the Department of Motor Vehicles, State of California* (slip opinion—May 14, 1984) California Court of Appeal, Fourth Appellate District, Division Three.

Lopez-Mendoza, this Court has indicated that such confinement may not be appropriate.

2. Possible Refinement of Janis.

While the value of *Lopez-Mendoza* as precedent is limited because of its partial dependency on some special features of immigration procedure, it may be possible to fashion some additional criteria for determining the appropriateness of civil extension of the exclusionary rule from *Janis* and *Lopez-Mendoza* combined. Non-application would follow, for instance in the presence of the following factors:

a. the evidence has already been excluded in an earlier criminal proceeding;

b. further exclusion would not be likely to deter police misconduct if the second, civil, hearing were beyond the offending officer's zone of primary interest. Such would be assumed to be the case:

i. in inter-sovereign situations;

ii. unique characteristics having to do with the status of the offender allow a law enforcement officer greater latitude in making an arrest or obtaining evidence, and/or allow an administrative judge greater latitude in what evidence he must have for a finding adverse to the offender. Any of the above would dilute the strong medicine of exclusion;

iii. other circumstances unique to the civil hearing concerned render the deterrence value of extension of the rule low, such as the officer's unlikely ability to anticipate that any civil hearing

will result from the evidence he seeks to obtain of criminal behavior.[7]

Such an evaluation must include consideration of the social costs of application, and when such costs will be deemed too high. One relevant consideration would certainly be whether society should have to pay the double cost of foregoing not only a criminal prosecution but the duty as well of revoking a license or other privilege extended to a holder, retention of which is contingent on good behavior.[8]

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7. This approach has met with approval in California (*People v. Moore, supra)* and in the Second Circuit *(Tirado v. Commissioner,* 689 F.2d 307 (2d Cir. 1982)) which focus in detail on the relationship—formal or informal—between the seizing official and the proponent of the evidence at the subsequent civil proceeding.

8. To paraphrase two quotes mentioned by Mr. Justice Stewart in *Elkins v. United States, supra:* Ought the criminal not only to go free but as well to continue with remunerative activity licensed and therefore blessed by society because the Constable has blundered? Or to paraphrase certain words of Professor Wigmore: "Titus, you have been found guilty of conducting a lottery in your cocktail lounge which you operate with the good graces and pursuant to a license bestowed upon you by the City. Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment and loss of said license for crime and Flavius for contempt. But no, we shall let you *both* go free—we shall not punish Flavius directly but shall do so by reversing Titus' conviction and by preventing the City from striking Titus' cocktail lounge from its list of licensed law-abiding liquor serving establishments. This is our way of teaching people like Flavius to behave and of teaching people like Titus to behave, and incidently of securing respect for the Constitution. Our way of withholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else. (paraphrase of 8 Wigmore, Evidence (3d ed. 1940)) Section 2184 at 364 U.S. at 217, 80 S.Ct. at 1444.

3. Option of no civil exclusion where criminal exclusion has already occurred.

The final option would be for this court to decline to extend the exclusionary rule to any civil proceeding where tainted evidence sought to be introduced has already been excluded from use in a criminal prosecution. This Court indicated in *Janis* a strong skepticism concerning the efficacy of the exclusionary rule in a forum "outside of the offending officer's zone of primary interest". 428 U.S. at 457, 96 S.Ct. at 3034. In most occasions where a law enforcement officer would be tempted to exceed the bounds of constitutionally proper search and seizure, the temptation is stimulated by the hope of a resulting criminal arrest. There may be little consideration that such an arrest might also subject his suspect to a civil penalty, even though the penalizing authority might be in some way "related" to the offending officer. In many cases such officers do not even know that their suspect would be subject to such a civil penalty.[9] To take *United States v. Janis* one step further, if the exclusionary rule is the "strong medicine" that its proponents claim it to be, then perhaps that "strong medicine" is most effectively administered by limiting the dosage to criminal hearings — and by not protracting the dosage where criminal application has already occurred.

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9. As the California Appellate Court for the Second District commented in *Governing Board v. Metcalf, supra:* "The police in making investigation of suspected criminal activity are, we surmise, generally completely unaware of any consequences of success in their investigative efforts other than the subsequent criminal prosecution of the suspected offender. 36 Cal. App.3d at 549, 111 Cal.Rptr. at 726.

The effect as precedent of further refinement of the balancing test or limitation of the exclusionary rule to criminal hearings should be greater uniformity in how lower courts deal with this issue. Regarding the effect of either option on law enforcement procedures, hopefully this Court would not chose an alternative that negated away deterrent effect upon improper search and seizure which criminal exclusion of improperly obtained evidence now has. Petitioner believes that clarification of the question of when the rule is or is not to be civilly applied must naturally improve the likelihood of deterrence when civil exclusion is called for.

C. Application of any of three tests would dictate reversal of the Rhode Island Supreme Court's decision below.

Petitioner believes that application of any of the three preceding tests by this Court to the facts presented by this appeal would justify a reversal of the Rhode Island Supreme Court's decision. This would obviously be true if this Court rendered an opinion foreclosing the application of the exclusionary rule to exclude from administrative hearings evidence which had already been suppressed in a criminal forum. Petitioner believes however that application of the *Janis* "balancing test" (as modified by *Lopez-Mendoza* to apply to intra-sovereign situations) would also lead to reversal.

1. Balancing interests in Case at bar would result in non-application of rule.

As previously mentioned, the Rhode Island Supreme Court did not really balance the competing interests that

pertain to the issue of extension of the exclusionary rule to liquor revocation hearings, but only asserted the importance of preserving the deterrent benefits of the rule by ensuring that unlawfully obtained evidence not be used in either a criminal proceeding, or subsequent administrative hearing. After citing earlier New York and Pennsylvania cases which supported application of the rule to liquor license hearings, the Rhode Island Court held that for reasons of deterrence: "it is certainly appropriate to apply the exclusionary rule in administrative proceedings when the police have searched premises known to be licensed for the sale of liquor and have turned over the fruits of the search to the administrative agency empowered to revoke the license." (Decision of Rhode Island Supreme Court, at A-6, Petition for Writ of Certiorari).

In its concern to protect the exclusionary rule from any erosion in Rhode Island by such a limitation, the Rhode Island court did not analyze whether in fact extension of the rule to liquor license hearings would have any incremental deterrent effect. This Court in *Janis* held that such a deterrent effect was unlikely, or at least severely attenuated, in "inter-sovereign" civil hearing situations, situations which fall outside a law enforcement officer's zone of primary interest.

Such attenuation could be argued to apply to the facts at bar, even though such facts do not qualify this case for "inter-sovereign" treatment. The Town of Tiverton admittedly employed the police officers who, in reliance on an insufficient warrant, searched for and found stolen goods on the premises of the Attic Lounge. The purpose

of that warrant was to permit access to the Lounge in order to determine whether stolen goods were being concealed there in violation of Rhode Island General Laws Section 11-41-2, which prohibits and establishes penalties for the possession of stolen items.[10] In this respect the Tiverton police officers, in seeking access to the Lounge, were acting as agents of the Attorney General of the State of Rhode Island, which is the sole enforcement authority for felony violations of the Rhode Island General Laws.[11] Their zone of primary interest was detection of state criminal law violations - as such the deterrent effects of the exclusionary rule should have been satisfied when this goal was thwarted by inadmissibility of evidence of the stolen goods at the subsequent state criminal proceeding.

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10. RIGL 11-41-2. Receiving stolen goods.—Every person who shall fraudulently receive any stolen money, goods, securities, chattels or other property, knowing the same to be stolen, shall be deemed guilty of larceny, although the person who stole the same may not have been prosecuted or convicted therefor; and the possession of any such stolen property shall be evidence of guilty knowledge by the person having such possession that such property was stolen, except such person shows that it was acquired in the due course of trade and for adequate consideration.

11. RIGL 42-9-3. Attendance on general assembly and court —Information on criminal matters.—The attorney general shall give his attendance at the general assembly, and at the Supreme and Superior Courts, for the service thereof; and shall give unto the said courts due advice and information concerning any criminal matters, breaches of the peace, or wrong done to the state or any of the citizens thereof, that shall come to his knowledge.

RIGL 42-9-4. Prosecution of offenses.—He shall draw and present all informations and indictments, or other legal or equitable process, against any offenders, as by law required, and diligently, by a due course of law or equity, prosecute the same to final judgment and execution.

This Court held in *Lopez-Mendoza* that even where a civil proceeding represents a civil complement to a possible criminal prosecution, and even where the offending officer's relationship to the sovereign controlling the civil proceeding is definitely "intra-sovereign", extension of the exclusionary rule is not called for where the incremental deterrence effect is suspected to be low. For reasons just previously stated, Petitioner believes such to be the case here. Unlike the immigration officers in *Lopez-Mendoza,* who made arrests and gathered evidence specifically for civil deportation hearings, Tiverton's police officers, in securing a warrant to search the Attic Lounge, were acting toward a goal of criminal prosecution.[12] Unlike the officers in *Lopez-Mendoza,* they had already seen that goal frustrated by suppression of the evidence which they obtained as a result of that search and dismissal of criminal actions filed against principals of the Lounge.

2. Additional factors mandate non-application.

Petitioner believes that application of the *Janis* balancing test together with consideration of the other additional criteria suggested by Petitioner earlier in this brief would clearly mandate reversal of the Rhode Island Supreme Court's decision. The allegedly tainted evidence seized at the Lounge has already been excluded in the criminal forum. Such initial exclusion having occurred, Pe'titioner believes that further exclusion in this case would

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12. As will be discussed later, they did not need a warrant to search the Lounge for liquor license violations.

be unlikely to deter police misconduct for the following reasons:

a. As previously argued, liquor license revocation hearings are beyond the zone of primary interest of a policeman whose chief concern is the enforcement of local or state criminal codes — in this case, the Tiverton police secured the warrant which was later found defective in order to search the Lounge for violations of Rhode Island General Laws Section 11-41-2, not for liquor license violations.

b. In addition, the strong medicine of the constitutional limitations of the exclusionary rule is diluted in Rhode Island and in most other states by statutes which in effect authorize warrantless searches of licensed liquor serving establishments in order to ascertain that licensing laws are not being violated and that order is being preserved. In Rhode Island that statute is Rhode Island General Laws Section 3-12-3 (page 54, Appendix to brief), which provides that municipal officials (which may include local police officers) may enter the premises of licensed liquor serving establishments "to ascertain the manner in which such person conducts his business and to preserve order." As the Rhode Island Supreme Court admitted in its decision at (A-10 Petition for Writ of Certiorari): "These statutes allow a right of access to licensed premises for the purpose of enforcing those statutes and regulations that relate to the conduct of licensed liquor establishments. Obviously while such officers are properly upon the premises, they may act appropriately in respect to any violations of law that are committed in their presence, or may act in respect to any evidence that

may properly be within plain view. See *Texas v. Brown* 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); *Coolidge v. New Hampshire,* 403 US 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)." Municipal officers or police officers legitimately upon the premises of a licensed liquor-serving establishment pursuant to RIGL Section 3-12-3 will be checking for violations of license regulations and may also check for violations of any of the laws of the State of Rhode Island. Discovery of any such violation, pursuant to RIGL Section 3-5-23 at (A-11 Petition for Writ of Certiorari), is sufficient grounds for license revocation, even in the absence of a criminal conviction for such violation.

Petitioner raised this argument with the Rhode Island Supreme Court which responded to it at (A-10 Petition for Writ of Certiorari) by stating that it was not confronted with the question of the propriety of the search and seizure allegedly conducted by the Tiverton police officers — that where such officers had seen fit, for whatever reasons, to enter the Attic Lounge by virtue of a search warrant rather than pursuant to Rhode Island General Laws Section 3-12-3, that the Court would not consider, for purposes of the issue of proper extension of the exclusionary rule, whether the officers had a right to be on the premises in any event, invalid warrant or not. Certainly however, this Court should find it extremely relevant, in its determination of how much deterrence is to be gained by extending the rule to such hearings, that the offending officers are by state statute, and by the fact of the concerned establishment being licensed by the state, not bound by the usual constitutional restrictions on search and seizure. What incremental deterrence

could possibly result in these circumstances? If application of the rule to liquor revocation hearings were affirmed, police officers in the State of Rhode Island will resort to the authority of Rhode Island General Laws Section 3-12-3 to enter establishments where criminal activity is suspected, rather than chancing entry on a possibly deficient warrant. The existence of such statutory authority also answers th argument that the officers, knowing they were in a licensed establishment, could reasonably anticipate that a license revocation might follow from their actions. Any possible deterrence to illegal conduct which might follow from an awareness that tainted evidence would be excluded from a subsequent license hearing is negated by a corresponding awareness of their special rights of entry to licensed premises afforded by RIGL Section 3-12-3.

3. Relevant social concerns dictate non-application.

Finally, there are the social concerns inherent in proper regulation of licensed liquor establishments. Although the Rhode Island Court did not give great weight to this important governmental function, the Illinois Supreme Court did in *Daley v. Berznaskis,* 47 Ill.2d 395, 269 NE2d 716 (1971). Said the Illinois Court:

> We consider first whether authorization for a warrantless search is constitutional. "Like other courts, this Court has often held that because of its nature the right to engage in the liquor trade is not an inherent one but is subject to regulation by the state in the exercise of its police power." [citations omitted] The Court, in *People ex rel. Fitzgerald v. Harrison,* 256 Ill. 102, 99 N E. 903 noted: "The business of selling intoxicating liquor is attended with danger to the community and is a recognized subject for regulation by the police power of the state. There is no inherent right to carry it on and it may be entirely prohibited. The manner and extent of its regulation, if permitted to be carried on at all, are to be determined by the state, so as to limit, as far as possible, the evils arising from it." (256 Ill. at 106, 99 N.E. at 904.) Because the business of selling liquor is closely related to certain evils in society, it is subject to any regulation which has any substantial relation to the public health, comfort, safety or welfare. "It is axiomatic that the legislative judgment as to what the public welfare requires its not open to judicial dispute so long as that judgment is not exercised in such an arbitrary, oppressive and unreasonable manner as to constitute a deprivation of due process of law. The legislature's discretion is broad, and its determinations may not be overturned because a court may think them unwise or inappropriate." (44 Ill.2d at 158, 254 N.E.2d at 504.) Considering the nature of the business we do not believe that a close scrutiny of the operation of the business through warrantless searches is unreasonable or arbitrary. 269 N.E.2d at 718 through 719

The *Daley* Court continued:

> We agree with the Ohio court [referring to *Soloman v. Liquor Control Commission,* 7 Ohio St.2d 31, 212 NE2d 595, cert. denied (1966) 384 U.S. 928, 86 S. Ct. 1445, 16 L.Ed.2d 531] that one who applies for and is issued a permit to sell alcoholic beverages thereby assents to the reasonable and lawful conditions imposed by statute and rule and find that due to the potentiality of criminal activity in the liquor business, there is no constitutional objection to requiring consent to a warrantless search as a pre-requisite to the issuance of a liquor license. The State of Illinois could completely prohibit the sale of liquor, but having instead chosen to regulate it, any restriction or

> requirement such as consent to a warrantless search which is necessary to protect public health, safety and morals is a reasonable exercise of the police power of the state. [citations omitted] 269 N.E.2d at 719

The Rhode Island Supreme Court itself recently quoted with approval from its earlier decision in *Di Traglia v. Daneker*, 83 R.I. 227, 230, 115 A2d 345, 347 (1955):

> The public has a vital and continuing interest in the control and supervision of the liquor traffic. Therefore the business of selling beverages, if permitted at all, is clearly and completely subject to the police power of the state in order that the health, morals and safety of the people generally may be protected against the evils of intemperance. In the exercise of that power, the state may impose restrictions and burdens, however great, which the legislature may deem advisable to prescribe so long as such provisions are not discriminatory or inconsistent with federal or state constitutional requirements. See *28 Prospect Hill Street, Inc. v. Gaines*, — R.I. — 461 A2d 923 (1983).

Also applicable to the case at bar is the distinction made by this Court in *Lopez-Mendoza* between proceedings which penalize prior misconduct of a complaining respondent, and proceedings which are more prospective in nature. In *Lopez-Mendoza* a deportation proceeding was defined in purpose a purely civil action to determine eligibility of an alien to remain in this country, not to punish an unlawful entry. Though entering and remaining unlawfully in the United States is itself a crime, any such past conduct is relevant in a deportation hearing only insofar as it might shed light on the respondent's right to remain here. Similarly, a liquor license revocation proceeding is a civil action to determine eligibility to continue to retain a liquor license, retention of which is as

much of a privilege to the holder as legal residency in the United States is to an alien. Liquor license revocation proceedings as well look prospectively to the holder's right to continue to retain such a license, with past conduct of the licensed activities being relevant only insofar as it may shed light on the holder's right to continue to claim the privilege of being a licensed server of alcoholic beverages.

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CONCLUSION

In conclusion, Petitioner would renew the request initially made in its Petition for Writ of Certiorari for further definition of the appropriate test to be applied in a determination of when the exclusionary rule ought, or ought not, to be applied to civil or administrative proceedings. Petitioner would also request that this Court clarify the existing status as citable precedent of the *One 1958 Plymouth Sedan* "quasi-criminal" ruling which has not been relied upon by this Court in its recent rulings on this issue, but which has not been distinguished or overruled. It continues to be a decision however upon which many lower courts rely in holding for application of the exclusionary rule to administration hearings such as the one at bar.

Petitioner believes that it is entitled to prevail under any of the three preceding tests suggested for review of the Rhode Island Supreme Court's decision. The Tiverton police officers who searched the Attic Lounge have already suffered the discomfort, and possibly also the professional discredit, of suppression of the results of

that search in the criminal proceeding against the officers of the Lounge. The cause of deterrence has therefore already been served. Petitioner believes that, contrary to the conclusion reached by the Rhode Island Supreme Court, any interest served by further extension of the exclusionary rule is not of the same significance as the social interest served by effective control over liquor-serving establishments. Whether this Court applies the *Janis* balancing test or any derivative thereof, or chooses a more arbitrary standard, review of the decision below ought to result in its reversal.

Petitioner therefore respectfully requests that the decision of the Rhode Island Supreme Court be reversed, and that this Court hold the exclusionary rule to have been improperly applied to the Attic Lounge liquor license revocation proceedings before the Tiverton Board of License Commissioners.

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